

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

LEGAL SECTION

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1997.03.10

H. THOMAS CADELL, JR., *Chief Counsel*

March 10, 1997

Jeffrey A. Berman, Esq.
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Los Angeles, CA 90067-5010

Re: **Exemption From IWC Orders Minimum Wage and Overtime
Requirements For Physicians Assistants and Nurse
Practitioners**

Dear Mr. Berman:

This is in response to your letter to Roberta Mendonca, State Labor Commissioner, dated December 17, 1996, requesting the DLSE's enforcement position regarding the exempt status of Physician Assistants and Nurse Practitioners under current IWC Wage Orders. As our letter of January 27th pointed out, this issue raised problems we had not dealt with in the past and that is the reason for the delay in our response.

Physicians' Assistants

As you point out, the Division has taken the position that Physicians Assistants may be exempt under the recently adopted "learned and artistic" exemption if they meet the requirements set out in federal guidelines defining that term. However, your statement in the letter to the effect that Physicians Assistants are exempt if they meet the federal restrictions is far too broad.

The IWC stated in their Statement as to the basis for the revised professional exemption orders that "The language also would permit, but would not be limited to, use of the federal guidelines for purposes of interpretation." (See Exhibit 'A' to Interpretive Bulletin 89-2) As Commissioner Aubry pointed out in Interpretive Bulletin 89-2, the federal regulations call for a salary test which the IWC Orders do not provide. Because of this inconsistency and the fact that the "salary test" is based on different criteria than that found in the California law, Commissioner Aubry explained that

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the existing IWC rule which allows the exemption only if the primarily engaged test is met, would be the rule adopted by DLSE in its enforcement policy. (Interpretive Bulletin 89-2, page 3) Thus, your statement that the Physicians Assistants are exempt if they meet certain criteria established by the Department of Labor is not a completely accurate interpretation of the Interpretive Bulletin's language since the federal guidelines do not use the "primarily engaged in" test.

Additionally, your statement that the Interpretive Bulletin directs employers to follow federal interpretations of FLSA (page 2 of your letter) is not a complete statement of the direction provided by the Memo. The Bulletin simply states that the guidelines provide the best definitions and a body of case law which we (DLSE) can use to analyze learned and artistic occupations. However, the analysis must be limited by the differences in the basic law and regulations.

For purposes of analysis of tasks traditionally performed by physician assistants and educational requirements, DLSE will look to the guidelines set out in the Department of Labor's Field Operations Handbook covering Physician Assistants (See Interpretive Bulletin 89-2, Exhibit C-12) to determine whether the workers are covered by the "learned and professional" exemption.

As you know, the DLSE does not opine on requests for blanket exemptions to the IWC Orders. Job qualifications and duties are considered by the DLSE personnel on a case-by-case basis and the decision as to whether an individual worker is exempt or not is based on an analysis of the facts submitted and the law. However, blanket exemptions are not provided.

In your letter you state: "As stated above, our client's Physician Assistants have the requisite educational background and experience to qualify for the exemption [found in Exhibit C-12 to Interpretive Bulletin 89-2]." However, a thorough reading of the letter fails to disclose the exact educational requirements required by your client. However, if, in fact, the educational requirements set out in Exhibit C-12 of Interpretive Bulletin 89-2 are met, that part of the test would appear to be met.

Nurse Practitioners

There has never been any argument that registered nurses would normally fall within the purview of the learned professional classification if the federal guidelines were the only criteria. However, as you know, the IWC went to great lengths to explain that while professional status is consistent with the true nature of

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nurses' duties and responsibilities, they would not exempt nurses as a class. However, in a carefully crafted Statement of Basis, the IWC also explained that nurses should be exempt if they individually met the criteria for an exemption under subsection (1) of Section 1 of Order 5-89. The Commission's major concern was that set out in the Statement of Basis:

With respect to an exception for nurses as professionals: during its general overtime review, the IWC had previously received testimony from the California Association of Hospitals and Health Systems (formerly the California Hospital Association) and individual nurses who urged the IWC to recognize nurses as professionals because they are considered professionals under the FLSA and professional status is consistent with the true nature of nurses' duties and responsibilities. On the other hand, the California Nurses Association (CNA) strongly opposed any modification of the applicability section which would exempt nurses "as a class" of professionals or which would preclude nurses from an exemption based on the other factors in subsection (1). Instead, CAN argued, each professional exemption should be examined individually, and decisions regarding professional status for registered nurses should depend on actual duties and responsibilities. The IWC heard and read testimony which indicated that professional recognition and a professional exemption under the IWC Orders were not synonymous. CNA testified that as long as employers fail to provide registered nurses with the rights and privileges generally conferred on a professional, i.e., consistent exercise of discretion and independent judgment, control over one's practice, and full integration in the decision making process, professional recognition and a professional exemption will remain mutually exclusive. Based on all the evidence presented, the IWC concluded that registered nurses still needed its protections and adopted language which clearly did not include nurses in a categorical professional exemption under subsection (2), but allowed nurses to be exempt as administrators, executives, or professionals if they individually met the criteria for an exemption under subsection (1). Again, the IWC deemed that some uniformity and consistency is desirable among the orders, especially for purposes of enforcement, and the IWC adopted the same language amending Section 1, Applicability, as it had previously adopted for Orders 1, 4, 5, and 10.

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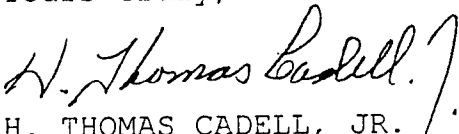
It seems apparent, then, that if the concerns which the IWC voiced, i.e., consistent exercise of discretion and independent judgment, control over one's practice, and full integration in the decision making process, were met, nurses, on an individual basis, could meet the requirements of the professional exemption.

All nurses exercise discretion and independent judgment. Most do so on a consistent basis. That, standing alone, cannot possibly be the criterion which caused the Commission to have concerns. It is the control over one's practice and integration in the decision making process which the Commission was specifically addressing. It is possible that Nurse Practitioners, under some circumstances, may meet these criteria. However, this is measured on a case-by-case basis.

However, again, as stated above, DLSE does not opine on requests for blanket exemptions to the IWC Orders. Job qualifications and duties are considered by the DLSE personnel on a case-by-case basis and the decision as to whether an individual worker is exempt or not is based on an analysis of the facts submitted and the law. However, blanket exemptions are not provided.

I hope this adequately addresses the issues you raised in your letter of January 23rd. Please excuse the delay in responding to this request.

Yours truly,


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